



Craig J. Brown

Suite 250
1099 New York Avenue, N.W.
Washington, DC 20001
Phone 303-992-2503
Facsimile 303-896-1107

Senior Associate General Counsel

VIA ECFS

April 17, 2013

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *In the Matters of Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Dear Ms. Dortch:

On April 16, 2013, CenturyLink filed an Opposition with confidential information in the above-captioned proceedings.¹ The non-redacted version of the Opposition was filed in hard copy with the Secretary's office, and a redacted version of the Opposition was filed via ECFS. Both the non-redacted and redacted versions of the Opposition were accompanied by a cover letter and an appended request for confidential treatment (neither the cover letter nor the request included any confidential information).

CenturyLink determined subsequently that there was a technical problem in viewing the Opposition via ECFS. Thus, CenturyLink is re-filing today the redacted version of its Opposition, including the cover letter and confidentiality request (CenturyLink is not re-filing the non-redacted version of the Opposition filed yesterday with the Secretary's office). No changes have been made to the redacted Opposition or associated documents being re-filed via ECFS on April 17, 2013.

¹ See *In the Matters of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Modified Protective Order, DA 10-2075, 25 FCC Rcd 15168 (rel. Oct. 28, 2010) (Modified Protective Order).

Ms. Marlene H. Dortch
April 17, 2013

Page 2 of 2

Please contact me if you have any questions.

Sincerely,

/s/ Craig J. Brown

Enclosures



Craig J. Brown

Suite 250
1099 New York Avenue, N.W.
Washington, DC 20001
Phone 303-992-2503
Facsimile 303-896-1107

Senior Associate General Counsel

REDACTED – FOR PUBLIC INSPECTION

VIA ECFS

April 16, 2013

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *In the Matters of Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 – Opposition of CenturyLink

Dear Ms. Dortch:

Enclosed for filing in the above-captioned dockets is the Opposition of CenturyLink, filed in response to the November 2, 2012 Petition of Ad Hoc Telecommunications Users Committee, *et al.*, which seeks to re-impose dominant carrier regulation on incumbent LEC-provided enterprise broadband services. The Opposition includes confidential information, which is being submitted pursuant to the Modified Protective Order in WC Docket No. 05-25 and RM-10593¹ and 47 C.F.R. § 0.459. Additionally, enclosed as Attachment A is a justification for the confidential treatment of the Opposition. The non-redacted version of the Opposition is marked: **CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 05-25, RM-10593, BEFORE THE FEDERAL COMMUNICATIONS COMMISSION.**

¹ See *In the Matters of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Modified Protective Order, DA 10-2075, 25 FCC Rcd 15168 (rel. Oct. 28, 2010) (Modified Protective Order).

Ms. Marlene H. Dortch
April 16, 2013

Page 2 of 2

Two hard copies of the non-redacted version of the Opposition are being filed with the Office of the Secretary (also included is an extra copy to be stamped and returned to the courier). Two hard copies of the non-redacted version of the Opposition are also being provided to Marvin Sacks of the Wireline Competition Bureau pursuant to the requirements of the Modified Protective Order in WC Docket No. 05-25 and RM-10593. The redacted version of the Opposition has been marked: **REDACTED – FOR PUBLIC INSPECTION**. A copy of this letter and the associated justification for confidential treatment, along with the redacted version of the Opposition, with the confidential information omitted, are being simultaneously filed via ECFS in WC Docket No. 05-25 and RM-10593.

Neither this letter nor Attachment A contains any confidential information.

Please contact me if you have any questions.

Sincerely,

/s/ Craig J. Brown

Enclosures

REDACTED – FOR PUBLIC INSPECTION

REDACTED – FOR PUBLIC INSPECTION

ATTACHMENT A

Confidentiality Justification

47 C.F.R. § 0.459

Information for which confidential treatment is sought

Pursuant to the terms of the Modified Protective Order, CenturyLink requests confidential treatment of certain information that is included in the accompanying Opposition being filed on April 16, 2013 in WC Docket No. 05-25 and RM-10593.¹ The confidential information indicates the rate of decline of the average price for services offered by CenturyLink's affiliates subject to forbearance (Qwest and Embarq). The confidential information is marked: **CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 05-25, RM-10593, BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**. This information is proprietary commercially sensitive information not routinely released to the public. As such, CenturyLink asks that the non-redacted version of its Opposition be afforded confidential treatment under both the Modified Protective Order and 47 C.F.R. § 0.459.

Commission proceeding in which the information was submitted

The information is being submitted in WC Docket No. 05-25, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers* and RM-10593, *In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*.

Degree to which the information in question is commercial or financial, or contains a trade secret or is privileged

The Opposition references sensitive commercial information in connection with the pricing of services subject to forbearance and the offering of enterprise broadband services pursuant to commercial agreements. Release of such information to CenturyLink's competitors would allow those competitors to gain a significant advantage in the marketplace and thereby cause CenturyLink substantial competitive harm.

Degree to which the information concerns a service that is subject to competition; and manner in which disclosure of the information could result in substantial competitive harm

¹ See *In the Matters of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Modified Protective Order, DA 10-2075, 25 FCC Rcd 15168 (rel. Oct. 28, 2010) (Modified Protective Order).

This type of information would generally not be subject to routine public inspection under the Commission's rules (47 C.F.R. § 0.457(d)). Moreover, the Wireline Competition Bureau found in the Modified Protective Order that "confidential information" means information "that is not . . . available from publicly available sources[.]"² The telecommunications services CenturyLink provides are all competitive. As noted, the release of the information in question would cause CenturyLink competitive harm by allowing its competitors to become aware of sensitive proprietary pricing information regarding services offered by CenturyLink.

Measures taken by CenturyLink to prevent unauthorized disclosure; and availability of the information to the public and extent of any previous disclosure of the information to third parties

CenturyLink has treated and treats the information disclosed in the document as confidential and has protected it from public disclosure.

Justification of the period during which CenturyLink asserts that the material should not be available for public disclosure

At this time, CenturyLink cannot determine any date on which this information should not be considered confidential.

Other information that CenturyLink believes may be useful in assessing whether its request for confidentiality should be granted

Under applicable Commission and court rulings, the information in question should be withheld from public disclosure. Exemption 4 of the Freedom of Information Act shields information that is (1) commercial or financial in nature; (2) obtained from a person outside government; and (3) privileged or confidential. The information in question satisfies this test.

² Modified Protective Order, 25 FCC Rcd at 15169 ¶ 4.

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Special Access Rates for Price Cap Local Exchange)	WC Docket No. 05-25
Carriers)	
)	
AT&T Corporation Petition for Rulemaking to)	RM-10593
Reform Regulation of Incumbent Local Exchange)	
Carrier Rates for Interstate Special Access Services)	

OPPOSITION OF CENTURYLINK

Craig J. Brown
CENTURYLINK
Suite 250
1099 New York Avenue, N.W.
Washington, DC 20001
(303) 992-2503
Craig.J.Brown@CenturyLink.com

Its Attorney

April 16, 2013

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. BACKGROUND.....	6
III. THE COMMISSION LACKS AUTHORITY TO “REVERSE” FORBEARANCE	10
A. The Act Does Not Give the Commission Authority to “Reverse” the Forbearance Granted in the <i>Enterprise Broadband Forbearance Orders</i>	11
B. Even if the Commission had Such Authority, Re-Imposition of Dominant Carrier Regulation Would Require the Commission to Follow Its Rulemaking Procedures.....	14
1. In Order to Consider the New Rules Sought by the Petitioners, the Commission Would Have to Initiate a Rulemaking.....	14
2. The Commission Also Would Have to Provide a Detailed, Reasoned Explanation for Its Departure from the Analysis and Conclusions in the <i>Enterprise Broadband Forbearance Orders</i> and Other Commission Decisions.....	16
IV. THE PETITIONERS HAVE FAILED TO DEMONSTRATE A NEED FOR DOMINANT CARRIER REGULATION IN THIS CONTEXT	18
A. The Static Market Power Analysis Advocated by Petitioners Is Unnecessary and Inappropriate for Enterprise Broadband Services	19
B. Enterprise Broadband Forbearance has Furthered the Commission’s Policies of Broadband Deployment and Adoption and Elimination of Unnecessary and Obsolete Regulations	22
C. Petitioners Point to No Changed Circumstances or Marketplace Failure Justifying a Retreat from the Competition-Enhancing Policies in the <i>Enterprise Broadband Forbearance Orders</i>	24
V. PETITIONERS’ PROPOSED RE-REGULATION WOULD UNDERMINE THE COMMISSION’S BROADBAND POLICIES AND DENY CONSUMERS THE BENEFITS OF THOSE POLICIES.....	29
A. Petitioners’ Proposed Rules Would Dampen Incentives to Deploy Fiber	29
B. Petitioners’ Proposed Rules Would Inflict the Harms on Competition and Consumer Welfare that the Commission Sought to Eliminate in the <i>Enterprise Broadband Forbearance Orders</i>	29
C. Petitioners’ Proposed Rules Would Disrupt Customers’ and Carriers’ Reasonable Reliance on the <i>Enterprise Broadband Forbearance Orders</i> and Call into Question All Prior Forbearance Relief	31

VI. FORBEARANCE FROM DOMINANT CARRIER REGULATION IS EVEN MORE JUSTIFIED TODAY THAN IT WAS IN 2007 35

A. Competitive Fiber Providers 36

B. Cable Providers 41

C. Wireless Providers..... 46

D. Providers Relying on Unbundled Copper Loops 48

VII. CONCLUSION 51

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Special Access Rates for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

OPPOSITION OF CENTURYLINK

CenturyLink respectfully submits this opposition to the Petition of Ad Hoc Telecommunications Users Committee, *et al.*, (Petitioners) seeking to re-impose dominant carrier regulation on ILEC-provided enterprise broadband services.¹ The Commission should reject the Petitioners’ unprecedented and unwarranted attempt to “reverse” the forbearance in question and thereby destroy the regulatory certainty and flexibility necessary for investment in next-generation IP networks and services.

I. INTRODUCTION AND SUMMARY

Each day, most Americans use Ethernet and other enterprise broadband services, albeit unwittingly, to conduct online banking, watch videos on a wireless device, collaborate with a work colleague in a distant city, or engage in other activities in cyberspace. Available from more than 30 providers, these enterprise broadband services offer a cost-effective, scalable means to

¹ See Petition of Ad Hoc Telecommunications Users Committee, BT Americas, CBeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-Based Special Access Services, WC Docket No. 05-25, RM-10593 (filed Nov. 2, 2012) (Petition).

connect end user locations and cell sites to carrier networks and the Internet, and therefore increasingly power the national and global wireline and wireless communications networks on which U.S. consumers and businesses rely.

This growing use of enterprise broadband services is due, at least in part, to the Commission's forward-looking regulation of these services. For six years, the Commission has applied a restrained, commonsense regulatory framework for enterprise broadband services. Since then, the migration to these services has accelerated, customers' choice of providers has grown, and prices have fallen. In a series of orders, the Commission used its statutory forbearance authority to eliminate tariffing and other dominant carrier regulations that applied, by default, to ILEC-provided enterprise broadband services and had required ILECs to provide one-size-fits-all service offerings. In doing so, the Commission found that these regulations are not necessary to ensure just, reasonable and nondiscriminatory charges and practices, and that their elimination would enable ILECs to negotiate customized service arrangements and respond more quickly to competing offers. The Commission therefore concluded that the action taken in the *Enterprise Broadband Forbearance Orders* would "enable competition in the broadband market [and] encourage investment in, and development of, new broadband services[.]"²

That is exactly what has occurred. For its part, CenturyLink has used forbearance from dominant carrier regulation to negotiate more than 300 commercial agreements with enterprise customers -- agreements that are tailored to customers' specific needs in a manner impossible through standard tariff offerings. At the same time, prices for the services covered by

² E.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18723 ¶ 29 (2007) (*AT&T Enterprise Broadband Forbearance Order*).

CenturyLink's forbearance have plummeted.³ Meanwhile, competitors have expanded the availability of their enterprise broadband services, over both their own facilities and unbundled copper loops purchased from ILECs at bargain-basement TELRIC rates. Despite this good news story, the Petitioners now seek to disrupt this well-functioning marketplace by re-imposing dominant carrier regulation on the ILECs' enterprise broadband services and also subjecting those services to pricing and service quality regulations -- all while maintaining minimal, nondominant regulation of their own services.

The Petition is fundamentally flawed in numerous ways:

First, the Commission lacks authority to grant the Petition. Section 10 specifies the conditions under which the Commission "shall forbear" from a regulation or statutory requirement, but neither that nor any other statutory provision gives the Commission authority to "reverse" forbearance. Even if it had such authority, the Commission could address the Petition only by rulemaking -- because the Petition asks the Commission to establish new dominant carrier, pricing and service quality "regulations"⁴ -- based on a detailed, reasoned explanation for its departure from the analysis and conclusions in the *Enterprise Broadband Forbearance Orders* and other Commission decisions.

Second, regardless of the type of proceeding conducted by the Commission, the Petitioners could not bear the burden of proving a need for the regulations they propose. Specifically, the Petitioners do not and could not show that there is any market failure requiring

³ As of February 2011, the average price for the services subject to the forbearance given legacy Embarq and Qwest had declined by [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] since they were detariffed in 2007 and 2008, respectively.

⁴ Petition at 8.

regulation, let alone that heavy-handed dominant carrier regulation is necessary to address any such failure.

Relying on old, irrelevant and incomplete data, the Petitioners paint a bleak picture in which competitors must rely on the ILECs' wholesale enterprise broadband services -- supposedly at "supra-competitive" rates -- to reach most commercial buildings. The reality is far different. ILECs face competition from a multitude of competitors, including competitive fiber providers,⁵ cable companies (which pass two-thirds of commercial buildings), and competitors using DS0 copper loops (available at TELRIC rates) to provide Ethernet over copper services to enterprise customers. If a customer location is not connected by fiber, which often is the case,⁶ an ILEC has no first-mover advantages with respect to that location.

Third, the Petitioners wrongly urge the Commission to employ the market power analysis that the Commission used in the *Phoenix Forbearance Order* for legacy, TDM-based services. The Commission acknowledged in that order itself that a static Phoenix-style market power analysis may well be inappropriate for dynamic broadband services such as those at issue here. That is an understatement. Six years of real-world experience has demonstrated that forbearance from dominant carrier regulation is even more justified today than it was in 2007. Not surprisingly, Petitioners cannot point to any way in which competition, or, more importantly,

⁵ Given that nearly two-thirds of commercial buildings still are not connected by fiber, ILECs generally have no unique advantage over their competitors in providing enterprise broadband services and face the same need to win revenue sufficient to justify a new fiber deployment.

⁶ According to a recent report, 64% of U.S. commercial buildings still are not connected by fiber facilities. Vertical Systems Group, *U.S. Business Fiber Gap Steadily Closing* (Mar. 12, 2013), available at <http://www.verticalsystems.com/prarticles/stat-fiber-us-fiber-penetration-2012.html>. Thus, ILECs do not have "ubiquitous networks of the facilities needed to provide special access services." See Petition at 53.

enterprise broadband customers, have been harmed by the Commission's elimination of dominant carrier regulation in this context.

Fourth, the Petitioners completely ignore the harms arising from dominant carrier regulation. As the Commission repeatedly found, dominant carrier regulation is not necessary to ensure just, reasonable and nondiscriminatory rates and practices for enterprise broadband services. At the same time, such regulation inflicts real burdens on customers and competition, because it prevents ILECs from offering customized service arrangements to meet customers' specific needs and quickly responding to competitors' offers. Re-imposing dominant carrier regulation in this context would also dampen providers' incentives to deploy broadband facilities and services, thus frustrating the Commission's broadband policies. Instead of retreating from these policies, the Commission should extend the same forbearance to all enterprise forbearance services.⁷

Fifth, dominant carrier regulation would unreasonably place ILECs at a competitive disadvantage and make them less effective competitors, to the detriment of enterprise broadband customers. Notably, six of the eight Petitioners provide enterprise broadband services in competition with the ILECs they seek to saddle with burdensome dominant carrier regulations. Those Petitioners include tw telecom, which is the third-largest provider of Ethernet services --

⁷ Most CenturyLink enterprise broadband services are free from dominant carrier regulation, including all enterprise broadband services provided by legacy Qwest and all but two provided by legacy Embarq. However, legacy CenturyTel's enterprise broadband services are still subject to dominant carrier regulation. Given this disparate regulatory treatment, CenturyLink filed a petition last year asking the Commission to forbear from dominant carrier regulation of its enterprise broadband services that are still subject to such regulation, but subsequently withdrew it. *See In the Matter of Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier Regulation and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, Order, WC Docket No. 12-60, DA 13-521 (Mar. 20, 2013) (granting CenturyLink's request to withdraw without prejudice).

ahead of CenturyLink. The Petition fails to explain how the fourth-largest provider of Ethernet services (CenturyLink) can be dominant while the third-largest provider (tw telecom) is not.

Finally, for all these reasons the new regulations sought by the Petitioners would conflict with the Administration's policy of eliminating unnecessary and burdensome regulations. Given the competitive marketplace, dominant carrier regulation of enterprise broadband services is not needed to ensure just, reasonable and nondiscriminatory rates, terms and conditions. Instead, such regulation would impose artificial barriers and costs that would unnecessarily constrain ILECs' ability to meet their customers' needs. Moreover, the unprecedented regulatory action urged by the Petitioners would frustrate the reasonable, investment-backed reliance of ILECs and their customers on the elimination of dominant carrier regulation of ILEC enterprise broadband services -- a reliance that has led them, over the course of the past six years, to sink billions of dollars in the capital-intensive fiber facilities needed to provide those services. Any re-imposition of dominant carrier regulation would upend the economic calculus underlying those sunk investments and trigger unusually searching judicial scrutiny. The proposed reversal of forbearance also would call into question all prior forbearance relief granted by the Commission and thereby destroy the certainty so essential to investment.

II. BACKGROUND

Beginning in 2001, the Commission implemented a set of policies to facilitate the deployment of next-generation broadband networks and services. It refrained from imposing blanket Title II obligations on broadband Internet services and IP voice services,⁸ removed most

⁸ See, e.g., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Order*); *Appropriate*

unbundling obligations on ILEC next-generation networks,⁹ and provided pricing flexibility for certain ILEC advanced services.¹⁰ In addition, the Commission generally eliminated dominant carrier regulation of ILEC-provided enterprise broadband services.¹¹ Following the grant of

Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*); *IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, 6040 ¶ 3 (2004) (noting that the Commission was not imposing any economic regulation on providers of interconnected VoIP service).

⁹ See, e.g., *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*) (subsequent history omitted) (fiber-to-the-home loops); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 19 FCC Rcd 20293 (2004) (*Fiber-to-the-Curb Reconsideration Order*); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Section 271 Broadband Forbearance Order*), *aff'd*, *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 19 FCC Rcd 15856 (2004) (*MDU Reconsideration Order*).

¹⁰ See, e.g., *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services; Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services*, Memorandum Opinion and Order, 20 FCC Rcd 16840 (2005).

¹¹ See *AT&T Enterprise Broadband Forbearance Order*, 22 FCC Rcd 18705 (2007); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer*

Verizon's forbearance petition by operation of law in 2006,¹² the Commission issued a series of orders forbearing from dominant carrier regulation and certain *Computer Inquiry* rules with respect to the enterprise broadband services provided at that time by AT&T, ACS of Anchorage, Embarq, Frontier and Qwest.

In those orders, the Commission addressed numerous legal and factual issues regarding the robustly competitive enterprise broadband marketplace, the burden and lack of utility of dominant carrier regulation in this context, and the benefits to competition and customers of eliminating that regulation. Specifically, the Commission found that:

- There are numerous competing providers of enterprise broadband services nationwide, and the marketplace generally is highly competitive.¹³
- The purchasers of these services are sophisticated and likely to be aware of, and take advantage of, the alternatives available to them.¹⁴
- Non-ILEC competitors can economically deploy OCn-level facilities and rely on TDM-based loops (in addition to their own facilities) to provide packetized broadband services. OCn-level facilities produce revenue levels that can justify the high cost of loop construction, and customers purchasing services over such facilities typically enter into long-term contracts that enable competing providers to recover their construction costs over lengthy periods.¹⁵

Inquiry Rules with Respect to Their Broadband Services, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (*Embarq Enterprise Broadband Forbearance Order*); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) (*Qwest Enterprise Broadband Forbearance Order*). These Comments refer to these orders collectively as the *Enterprise Broadband Forbearance Orders*.

¹² *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, Public Notice, WC Docket No. 04-440 (Mar. 20, 2006).

¹³ See, e.g., *AT&T Enterprise Broadband Forbearance Order*, 22 FCC Rcd at 18719-20 ¶ 23.

¹⁴ See, e.g., *id.* at 18720 ¶ 24.

¹⁵ See, e.g., *id.* at 18720-22 ¶¶ 25-26, 18725 ¶ 32.

- Tariffing and other dominant carrier requirements make only a “negligible” contribution “to ensuring just, reasonable, and nondiscriminatory charges and practices for these services.”¹⁶
- Continuing to apply dominant carrier regulation to the specified enterprise broadband services would perpetuate market inefficiencies, inhibit carriers from responding quickly to rivals’ new offerings and impose other unnecessary costs. In contrast, detariffing these services would facilitate innovative integrated service offerings designed to meet changing market conditions, increase customers’ ability to obtain service arrangements that are specifically tailored to their individual needs, and enable the ILEC to respond quickly and creatively to competing service offers.¹⁷
- Dominant carrier regulation of an ILEC’s enterprise broadband services makes it unnecessarily difficult for the ILEC to negotiate nationwide arrangements tailored to the needs of large enterprise customers with geographically dispersed locations, because its tariff filings necessarily provide competitors with notice of its pricing strategies and competitive innovations.¹⁸
- The Commission’s pricing flexibility rules do not provide sufficient regulatory relief to allow an ILEC to meet its customers’ needs and compete effectively.¹⁹
- Eliminating dominant carrier tariffing and pricing requirements with respect to an ILEC will make the ILEC a more effective competitor for enterprise broadband services, which in turn will increase competition even further.²⁰
- Such forbearance also will promote the public interest by furthering advanced services deployment.²¹

These findings were upheld on appeal by the D.C. Circuit, which further found that granting forbearance on a nationwide basis was reasonable given “the rapidly changing state of the overall

¹⁶ See, e.g., *id.* at 18723-24 ¶ 30.

¹⁷ See, e.g., *id.* at 18725 ¶ 33.

¹⁸ See, e.g., *id.* at 18730-31 ¶ 46.

¹⁹ See, e.g., *id.* at 18725-26 ¶ 34.

²⁰ See, e.g., *id.* at 18726 ¶ 35.

²¹ See, e.g., *id.* at 18731 ¶ 47.

broadband market and § 706's direction that the FCC may look to and attempt to shape possible future developments in regulating broadband[.]”²²

Such nationwide relief also comported with other Commission orders related to broadband services, including the *Cable Modem Order*, *Triennial Review Order*, *MDU Reconsideration Order*, *FTTC Reconsideration Order*, *Section 271 Broadband Forbearance Order* and *Wireline Broadband Order*, as well as the Commission's consideration of competition for multi-location enterprise customers in the SBC/AT&T and Verizon/MCI mergers.²³

This precedent was left undisturbed by the Commission's 2010 decision in the *Phoenix Forbearance Order*. In that order, the Commission denied Qwest's request for forbearance from certain unbundling requirements and dominant carrier regulation of its legacy TDM services in Phoenix,²⁴ but acknowledged that “a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities,” given section 706's mandate and the dynamic broadband marketplace.²⁵

III. THE COMMISSION LACKS AUTHORITY TO “REVERSE” FORBEARANCE

In seeking to “reverse” the *Enterprise Broadband Forbearance Orders*, the Petitioners ask the Commission to take action that exceeds its statutory authority. Moreover, even if the

²² *Ad Hoc Telecomm'ns Users Committee v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009) (*Ad Hoc v. FCC*).

²³ See *SBC Communications Inc. and AT&T Corp. Applications for Approval for Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18325 ¶ 63 (2005) (*SBC/AT&T Order*); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18467 ¶ 63 (2005) (*Verizon/MCI Order*).

²⁴ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, (2010) (*Phoenix Forbearance Order*).

²⁵ *Id.* at 8644-45 ¶ 39.

Commission had authority to re-impose dominant carrier regulation on the ILECs' enterprise broadband services, it could do so only in a manner consistent with its rulemaking procedures.

A. The Act Does Not Give the Commission Authority to “Reverse” the Forbearance Granted in the *Enterprise Broadband Forbearance Orders*

Section 10 directs that the Commission “shall forbear” from application of a regulation or statutory provision if it determines that the three-part test in section 10 is satisfied.²⁶ Consistent with its deregulatory bent, section 10 places a thumb on the scale in favor of forbearance by imposing a strict deadline for Commission action on a forbearance petition and by providing that, if the deadline is missed, the requested forbearance will be “deemed granted.”²⁷

Whenever forbearance from a statutory provision is granted, whether by Commission inaction or by an affirmative forbearance decision, the effect is to nullify that provision -- and, for all practical purposes, remove it from the United States Code -- as it applies to particular carriers and services.²⁸ Once that happens, the Commission has no power to “re-enact” the lapsed statutory provision; Congress alone can do that because Congress alone can enact new legislation. At a minimum, to avoid creating serious concerns under the non-delegation and separation-of-powers principles, an agency should not be deemed to possess the fairly extraordinary power to add lapsed statutory provisions back into the United States Code -- in form or in substance -- unless Congress has delegated that power to the agency in unambiguous

²⁶ 47 U.S.C. § 160(a).

²⁷ 47 U.S.C. § 160(c); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

²⁸ See, e.g., *Sprint Nextel*, 508 F.3d at 1132 (noting that, as in the section 272 sunset context, “Congress ma[kes] the decision to extinguish [the relevant statutory provisions] by operation of law” when forbearance is deemed granted).

terms.²⁹ By the plain terms of section 10, Congress did grant the Commission an express delegation to *negate* statutory provisions insofar as they have outlived their usefulness. But Congress never granted the Commission any corresponding power to enact provisions back into law once they have lapsed. That is because, in 1996, Congress (accurately) expected that the industry-wide transition from monopoly to competition would make monopoly-style regulation less appropriate, not more.

Here, the Petitioners ask the Commission to resurrect a variety of tariffing and other monopoly-style statutory requirements under sections 203 and 214.³⁰ But the Commission lacks authority to re-enact, for example, section 203's tariff obligations and section 214's dominant-carrier discontinuance requirements. The Commission is a regulatory agency that must operate within the confines of its enabling statute, rather than its "own conception of how the statute should be rewritten in light of changed circumstances."³¹ Any post-forbearance re-imposition of statutory requirements, therefore, "must come from Congress[.]"³²

The legislative history of section 10 reinforces this conclusion. Both the House and Senate reports accompanying the 1996 Act confirm that Congress intended for the Commission to use the forbearance provision to eliminate unnecessary regulation, with no expectation that it

²⁹ See, e.g., *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (holding that only Congress can enact laws and must do so by means of the procedures specified in Article I of the Constitution); *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205-06 (2009) (articulating "constitutional avoidance" doctrine).

³⁰ See, e.g., *AT&T Enterprise Broadband Forbearance Order*, 22 FCC Rcd at 18706 ¶ 1 n.5 (granting forbearance from the requirements contained in sections 203 and 214 (as it relates to dominant carriers), as well as certain sections of the Commission's rules).

³¹ See *MCI v. FCC*, 765 F.2d 1186, 1195 (D.C. Cir. 1985) (finding that the pre-1996 Act Commission lacked authority to "command that common carriers not file tariffs").

³² *Id.*

would later re-impose it. According to the House Report, the House Commerce Committee anticipated that the forbearance authority in the House bill “will be a useful tool in *ending* unnecessary regulation.”³³ As stated in the accompanying Senate Report, the forbearance statute permits the Commission “to reduce the regulatory burdens on [a] telephone company when competition develops or when the FCC determines that relaxed regulation is in the public interest.”³⁴

Although the Commission has suggested that it can revisit a grant of forbearance,³⁵ it has not explained the basis for its authority to re-impose negated statutory provisions. Similarly, while the D.C. Circuit stated that the Commission’s forbearance decisions in the *Enterprise Broadband Forbearance Orders* are not “chiseled in marble,”³⁶ it has not held that the Commission can reverse those forbearance decisions, and indeed that issue was not before the D.C. Circuit in the first place. Rather, in upholding the Commission’s elimination of dominant carrier regulation in this context, the court noted the Commission’s intent to “address, on an industry-wide basis, general concerns about discriminatory practices by ILECs with respect to their special access lines.”³⁷ Given the “broader public debate over this issue,” as well as the pending special access proceeding, the court therefore found that “Congress and the FCC will be able to reassess as they reasonably see fit based on changes in market conditions, technical

³³ House Report 104-204 (104th Cong., 1st Sess.) accompanying H.R. 1555, July 24, 1995 at 89 (emphasis supplied). *See also* 141 Cong. Rec. H8291 (daily ed. Aug. 2, 1995) (statement of Rep. Stearns).

³⁴ Senate Report 104-230 (104th Cong., 1st Sess.) accompanying S. 652, Mar. 30, 1995 at 5. *See also* 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler).

³⁵ *See, e.g., AT&T Enterprise Broadband Order*, 22 FCC Rcd at 18723 n.120.

³⁶ *Ad Hoc v. FCC*, 572 F.3d at 911.

³⁷ *Id.*

capabilities, or policy approaches to regulation in this area.”³⁸ The Petitioners flatly ignore the court’s expectation of a Congressional role in any new regulation post-forbearance.

B. Even if the Commission had Such Authority, Re-Imposition of Dominant Carrier Regulation Would Require the Commission to Follow Its Rulemaking Procedures

Even if the Commission had authority to re-impose dominant carrier regulation in this context, it could do so only through rulemaking. Thus, the Commission would need to initiate a rulemaking, gather information on the current state of the market for enterprise broadband services, revisit the detailed factual and legal findings in the *Enterprise Broadband Forbearance Orders*, and consider the serious reliance interests both of the affected ILECs and their customers engendered by the Commission’s elimination of dominant carrier regulation six years ago.

1. In Order to Consider the New Rules Sought by the Petitioners, the Commission Would Have to Initiate a Rulemaking

Today, the ILECs that received forbearance from dominant carrier regulation are under no obligation to tariff the enterprise broadband services covered by the *Enterprise Broadband Forbearance Orders*. Indeed, they are prohibited from doing so.³⁹ The Petitioners ask the Commission to re-impose these tariff obligations, by classifying “incumbent LECs as dominant in the provision of non-TDM-based special access services.”⁴⁰ In addition, the Petitioners urge the Commission to promulgate new rules: “pricing regulations (to be implemented via tariffs) and service quality regulations for incumbent LEC non-TDM-based special access services.”⁴¹

³⁸ *Id.*

³⁹ See, e.g., *AT&T Enterprise Broadband Forbearance Order*, 22 FCC Rcd at 18729 ¶ 42.

⁴⁰ Petition at 8.

⁴¹ *Id.* See also *id.* at 59 (“These regulations should be similar to those that the Commission applies to those TDM-based special access services for which the Commission concludes that incumbent LECs have market power. Those regulations should include pricing regulations to be

Such regulations could be imposed only through the Commission's normal rulemaking processes. Thus, the Commission would have to issue an NPRM and gather information on the current state of the market,⁴² and could adopt the regulations sought by Petitioners only to the extent it found substantial evidence of a market failure that could reasonably be addressed by those regulations, based on changed circumstances, and that one or more of the section 10 factors are no longer met.⁴³ As the proponents of additional regulation, the Petitioners would bear the burden of proof in this inquiry.⁴⁴

The Commission could not take this action through adjudication, because it would be imposing *new* regulatory obligations, rather than interpreting or applying existing law.⁴⁵ For the

implemented in tariffs that incumbent LECs must file with the Commission. In addition, . . . the Commission should adopt appropriate service quality regulation for non-TDM-based special access services, to be implemented in incumbent LEC tariffs.”). The Petitioners acknowledge that current service quality regulation apply only to TDM-based special access services. *See id.* at 59-60 n. 201.

⁴² The Petition seems to imply that the Commission's 2005 *Special Access NPRM* fulfills the requirement to provide notice of an intention to re-impose dominant carrier regulation on ILEC enterprise broadband services. *See id.* at 24 n. 74. Of course it could not, however, as the *Special Access NPRM* was issued *prior to* the *Enterprise Broadband Forbearance Orders* and the Verizon deemed-grant.

⁴³ *See Amendment of 47 CFR § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, Tentative Decision and Request for Further Comments, 94 FCC 2d 1019 ¶ 107 (1983). *See, also*, Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* at 9 (May 16, 2010) (“In order to overturn a grant of forbearance, the Commission would first have to compile substantial record evidence that the circumstances it previously identified as supporting forbearance had changed[.]”), *available at* <http://www.fcc.gov/document/statement-fcc-general-counsel-austin-schlick-third-way-legal-framework-addressing-comcast-d>.

⁴⁴ *See* 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd 9543, 9554-55 ¶ 20 (2009).

⁴⁵ *See Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service; Petitions for Reconsideration and Clarification of the InterCall Order; Global*

same reason, the Commission also could not do so through interpretative rule.⁴⁶ Indeed, the Commission initially classified the BOCs and independent ILECs as dominant *through rulemaking*,⁴⁷ and later used its rulemaking authority to reclassify them as nondominant in the provision of in-region, interstate long-distance services.⁴⁸

2. The Commission Also Would Have to Provide a Detailed, Reasoned Explanation for Its Departure from the Analysis and Conclusions in the *Enterprise Broadband Forbearance Orders* and Other Commission Decisions

Regardless of the administrative procedure employed, the Commission could not re-impose dominant carrier regulation without determining, through detailed fact-finding, that one or more of the section 10 criteria would no longer met. In doing so, it also would need to provide a reasoned explanation for its departure from the *Enterprise Broadband Forbearance Orders* and other applicable precedent. The need for such explanation is heightened here, given

Conference Partners, A+ Conference Ltd., Free Conferencing Corporation, and The Conference Group, Order on Reconsideration, 27 FCC Rcd 898, 905 ¶ 15 (2012) (“The Commission may interpret its own rules consistent with existing regulation, without initiating a new rulemaking proceeding.”); *Verizon Telephone Companies and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, Order, 26 FCC Rcd 13145, 13161-62 ¶ 20 (2011) (“An agency may, through adjudication, interpret an ambiguous term in its governing statute or its regulations.”).

⁴⁶ *U.S. v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989) (“This court has previously found agency rules explaining ambiguous terms in statutes and regulations to be interpretative [and] rules that merely restate existing duties, rather than creating new duties, to be interpretative. . . . In contrast, we have found rules that grant rights and impose obligations to be substantive.”) *See, also, American Mining Congress, et al. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (determining whether a rule is substantive or interpretive turns “almost exclusively on the basis of whether the purported interpretative rule has ‘legal effect.’”).

⁴⁷ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 22-24 ¶¶ 62-65 (1980) (*Competitive Carrier First Report and Order*).

⁴⁸ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Order, 12 FCC Rcd 15756 (1997).

that the Commission's decisions in the *Enterprise Broadband Forbearance Orders* have shaped the development of the enterprise broadband market over the past six years.

As noted, the Commission made numerous detailed findings in those orders regarding the relevant characteristics of the enterprise broadband marketplace: that it is robustly competitive; that purchasers are sophisticated and have considerable bargaining power; that dominant carrier regulation has only a "negligible" impact on ensuring just, reasonable and nondiscriminatory rates and practices; and that dominant carrier regulation creates market inefficiencies, inhibits competition, and precludes the development of innovative service offerings.⁴⁹ Before re-imposing dominant carrier regulation in this context, the Commission would need to explain the basis for its departure from each of these findings. That reasoned explanation also would have to take account of the striking benefits that have resulted from forbearance over the past six years -- including lower prices and innovative service offerings -- and the lack of any concrete evidence of harms from that forbearance. In addition, the Commission would have to explain its departure from applicable precedent in other orders dating back more than a decade, regarding the existence of a nationwide market for broadband services and the use of forbearance to further the goals of section 706.⁵⁰

Finally, under *FCC v. Fox Television*, the Commission would need to provide a more detailed justification than would suffice if it were creating dominant carrier regulation on a blank slate. That is the case for two reasons. *First*, this change in policy would rest upon factual

⁴⁹ See Section II.

⁵⁰ See *id.* (noting the nationwide relief, based in part on Section 706, in the *Cable Modem Order*, *Triennial Review Order*, *MDU Reconsideration Order*, *FTTC Reconsideration Order*, *Section 271 Broadband Forbearance Order* and *Wireline Broadband Order*, as well as the Commission's consideration of competition for multi-location enterprise customers in the SBC/AT&T and Verizon/MCI mergers).

findings that contradict those underlying the *Enterprise Broadband Forbearance Orders*.⁵¹

Second, as discussed below, the Commission's elimination of dominant carrier regulation engendered serious reliance interests both for the affected ILECs and their customers.⁵² In such circumstances, "[i]t would be arbitrary or capricious to ignore such matters."⁵³

For the reasons discussed below, the Commission could not make these determinations consistent with reasoned decision-making.

IV. THE PETITIONERS HAVE FAILED TO DEMONSTRATE A NEED FOR DOMINANT CARRIER REGULATION IN THIS CONTEXT

Even a cursory review of the Petition reveals a stark mismatch between the dramatic change in regulation sought by the Petitioners and the meager evidence they submit in support. The Petitioners seek no less than a return to a regulatory structure established in 1980, when the ILECs were classified as "dominant" providers.⁵⁴ In support, they rely primarily on a static analysis that the Commission itself has recognized as ill-fitted for a dynamic market such as that for the services at issue here, as well as a combination of old,⁵⁵ irrelevant,⁵⁶ and incomplete

⁵¹ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

⁵² See *id.*; Section V.C (discussing reliance interests).

⁵³ *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 516.

⁵⁴ See *Competitive Carrier First Report and Order*, 85 FCC 2d at 22-24 ¶¶ 62-65.

⁵⁵ Much of the data cited by the Petitioners regarding the purported lack of "actual competition" is seven or more years old and therefore says little about rapidly-evolving markets for enterprise broadband services. See Petition at 41-46 (relying on pre-2006 GAO data, pre-2005 data analyzed in the SBC-AT&T and Verizon-MCI mergers, and pre-2004 data submitted in the *TRRO* proceeding).

⁵⁶ Petition at 43-44 (relying on Commission findings in the *Verizon 6-MSA Order* and *Qwest 4-MSA Order*, which did not concern enterprise broadband services).

data.⁵⁷ The Petitioners also ignore the ways in which the *Enterprise Broadband Forbearance Orders* have promoted the Commission's goals of broadband deployment and adoption by giving all providers incentives to deploy broadband facilities and services. Not surprisingly, the Petitioners can point to no changed circumstances or marketplace failure that could justify a retreat from these competition-enhancing policies.

A. The Static Market Power Analysis Advocated by Petitioners Is Unnecessary and Inappropriate for Enterprise Broadband Services

Given the passage of time, the Commission can observe the real-world results of freeing ILEC enterprise broadband services from dominant carrier regulation: more broadband deployment, increased competition, lower prices and customized service arrangements. Thus, there is no need for the static, "traditional market power" analysis advocated by the Petitioners.

In any case, that analysis would be inappropriate here. The *Phoenix Forbearance Order* dealt only with Qwest's legacy services because the Commission had previously forbore from dominant regulation of Qwest's enterprise broadband services.⁵⁸ Moreover, the Commission explicitly acknowledged the shortcomings of applying the static market power analysis used in

⁵⁷ Petition at 45-46 (relying on data submitted in response to the Commission's *First Special Access Data Request*, to which fewer than 10 percent of CompTel's members submitted data). See Opposition of Federal Communications Commission to Petition for Writ of Mandamus, *In re COMPTel, et al.*, D.C. Cir. No. 11-1262, at 21-22 (filed Oct. 6, 2011) (explaining to the D.C. Circuit that "fewer than 10 percent of . . . COMPTel's service provider members (7 of approximately 90) submitted data concerning their experience in the special access market.") (Mandamus Opposition).

⁵⁸ Petitioners imply that the Tenth Circuit affirmed the Commission's use of traditional market power analysis for Qwest's legacy enterprise services. Petition at 21. In fact, Qwest's appeal only concerned the Commission's analysis of the mass market in Phoenix. Thus, the court did not address the Commission's treatment of Qwest's legacy *enterprise* services. *Qwest v. FCC*, 689 F.3d 1214, 1216 (10th Cir. 2012) ("Qwest challenges the Commission's decision only as it pertains to Qwest's mass market retail services in the Phoenix MSA.").

the *Phoenix Forbearance Order* to dynamic markets for broadband services.⁵⁹ It is widely understood that market shares for an industry segment characterized by innovation and changing technology may not be meaningful predictors of future competitive conditions.⁶⁰ In such cases, a firm's market position today "may say little about the firm's prospects one, two or five years from now, and the greater the level of innovation in an industry, the less reliable a predictor of future events market share becomes."⁶¹

This is certainly true in the enterprise broadband marketplace today, as skyrocketing bandwidth demands drive customers to migrate to higher capacity broadband services.⁶² According to customer reporting gathered as part of the ATLANTIC-ACM Metro Wholesale Report Card, for example, wireless carriers' spending on "OCx and above" (including Ethernet) grew from one-third to two-thirds of their overall spending on local transport from 2008 to

⁵⁹ *Phoenix Forbearance Order*, 25 FCC Rcd at 8644-45 ¶ 39 (finding that "a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy services," given the evolving nature of advanced services and the directives of section 706).

⁶⁰ DOJ/FTC Horizontal Merger Guidelines § 5.2 (issued Aug. 19, 2010) ("recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance.").

⁶¹ Michael L. Katz and Howard A. Shelanski, *Mergers and Innovation*, 74 *Antitrust L.J.* 1, 14-15 (2007).

⁶² See Frost & Sullivan, *Analysis of the U.S. Retail Carrier Ethernet Services Market, 2012: Revenue Growth Surges as Carrier Ethernet Crosses the Chasm* at 31 (Nov. 2012) ("Revenue growth continues to exceed our forecasts due to the faster than expected rate of market migration from traditional services to Ethernet."). The Petitioners' proposed wire-center based analysis would also be administratively burdensome and inconsistent with the way in which customers typically view the enterprise broadband marketplace. Such customers seek simple, uniform rates, terms and conditions on a regional or national basis. By potentially establishing differing regulations across wire centers, the Petitioners' proposed re-regulation would make it impossible for ILECs to provide customers the service arrangements they seek.

2011.⁶³ Carriers' methods of providing enterprise broadband services are fast evolving as well. For example, Ethernet over copper was largely unheard of at the time of the *Enterprise Forbearance Orders*, while today CLECs are using it very effectively to win customers.

Despite these considerations, the Petitioners suggest that the Commission can apply a "traditional market power analysis" to the dynamic market for enterprise broadband services because "the same facilities that can be used to provide the legacy TDM-based unbundled network elements at issue in the *Phoenix Order* are used to provide the non-TDM-based special access services at issue in the *Forbearance Orders* and Verizon's deemed grant."⁶⁴ That is not correct. TDM-based UNEs are almost always provided over copper, whereas enterprise broadband services are frequently (though not always) provided over fiber. For the vast majority of commercial buildings (*i.e.*, those not served by fiber), the ILECs are essentially new entrants for fiber-based enterprise broadband services, with no meaningful advantage over CLECs.⁶⁵ The Commission's analysis in the *Phoenix Forbearance Order* therefore provides no useful information about the market position of CenturyLink and other ILECs in the provision of enterprise broadband services.⁶⁶

⁶³ Atlantic-ACM, Wireless Backhaul: Sustaining Ethernet Growth in the Coming Years at 10, available at <http://www.atlantic-acm.com/images/stories/whitepapers/aacmbackhaul2012.pdf> (2010).

⁶⁴ Petition at 29.

⁶⁵ See Section VI.A.

⁶⁶ A much closer analogy is the Commission's analysis of fiber-to-the-home loops in the *Triennial Review Order*, where the Commission found that ILECs and CLECs faced the same entry barriers and revenue opportunities in deploying such loops. See *Triennial Review Order*, 18 FCC Rcd at 17143-44 ¶¶ 275-76.

B. Enterprise Broadband Forbearance has Furthered the Commission's Policies of Broadband Deployment and Adoption and Elimination of Unnecessary and Obsolete Regulations

The Petitioners also ignore the ways in which the *Enterprise Broadband Orders* have promoted two key objectives of the current Administration: accelerating broadband deployment and adoption *and* eliminating unnecessary and obsolete regulations.

Section 706 directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . regulatory forbearance . . . [to] remove barriers to infrastructure investment.”⁶⁷ That is exactly what the Commission did in the *Enterprise Broadband Orders*. By eliminating dominant carrier regulation of enterprise broadband services, the Commission enabled ILECs to compete more effectively and therefore gave all providers incentives to invest in broadband facilities and services.⁶⁸

Over the past six years, revenues for enterprise broadband services have grown exponentially. According to Frost & Sullivan, “[m]arket migration from traditional network services (private line, ATM, Frame Relay) to Ethernet is contributing to double digit growth in Ethernet revenues.”⁶⁹ In 2005, Ethernet services accounted for \$650 million per year.⁷⁰ By the end of 2012, those revenues exceeded \$3 billion annually and were predicted to grow to over \$11 billion by 2017.⁷¹ At the same time, prices for enterprise broadband services have been falling,⁷²

⁶⁷ Telecommunications Act of 1996 § 706(a).

⁶⁸ See, e.g., *AT&T Enterprise Broadband Forbearance Order*, 22 FCC Rcd at 18732 ¶ 49.

⁶⁹ Frost & Sullivan, *Analysis of the U.S. Retail Carrier Ethernet Services Market, 2012: Revenue Growth Surges as Carrier Ethernet Crosses the Chasm* at 28.

⁷⁰ The Insight Research Corp., *Public Ethernet Services: 2007-2012*, at 5 (2007).

⁷¹ Cable Enterprise Services at 125.

making them more attractive to businesses of all sizes. For its part, CenturyLink has entered into more than 300 commercial agreements with enterprise broadband purchasers of all sizes, resulting in average price reductions of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]. Residential customers have benefited from enterprise broadband forbearance as well, because the extension of fiber into the network for business services feeds the entire broadband ecosystem and expands the reach and speed of residential broadband services.

The forbearance granted in the *Enterprise Broadband Forbearance Orders* also eliminated “outmoded” and “excessively burdensome” regulatory provisions, consistent with the Commission’s subsequent implementation of Executive Order 13579. In 2011, President Obama directed independent regulatory agencies to develop a plan for promoting “retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”⁷³ In implementing the Executive Order, the Commission identified three factors for determining whether a regulation is “ripe” for retrospective analysis:

- (1) The regulation “has been affected by changes in technology or new scientific research or changes in market structure”;
- (2) The regulation “has a disproportionate or undue burden on particular entities, has caused unintended negative effects, or could result in greater net benefits to the public if modified”; and

⁷² For mobile backhaul services, “[g]reater competition among vendors, as well as competing backhaul platforms, is creating downward pricing pressures for backhaul service providers; which, in turn, is impacting their revenues and profitability.” Frost & Sullivan, *U.S. Mobile Backhaul Services Market: Wireless Service Provider Spending Trends*, at 6 (Oct. 2011).

⁷³ Executive Order 13579, *Regulation and Independent Regulatory Agencies*, 76 Fed. Reg. 41587 § 2 (July 14, 2011).

- (3) The regulation “has been subject to frequent requests for waivers by affected stakeholders or been identified by the public as needing revision.”⁷⁴

The dominant carrier regulations in question undoubtedly satisfy each of these criteria: profound “changes in market structure” have resulted in more than 30 national and regional providers of enterprise broadband services; the regulations in question had a “disproportionate” and “undue burden” on ILECs and ultimately their customers, and caused the “unintended negative effect[]” of preventing ILECs negotiating the customized arrangements that these customers seek; and the requirements were the subject of “frequent requests for waivers,” in the form of the forbearance petitions that the Commission granted in the *Enterprise Broadband Forbearance Orders*.

C. Petitioners Point to No Changed Circumstances or Marketplace Failure Justifying a Retreat from the Competition-Enhancing Policies in the *Enterprise Broadband Forbearance Orders*

Tellingly, the Petitioners spend only a page and a half (of 61 pages) discussing the harm allegedly caused by the *Enterprise Broadband Forbearance Orders*. In fact, the Petitioners can point to no changed circumstances or market failure that could justify a retreat from the competition-enhancing policies in those orders.

As a starting point, it is instructive to note what the Petitioners do not claim. They do not assert (nor could they) that the *Enterprise Broadband Forbearance Orders* have led to less demand for enterprise broadband services than in 2007. They do not assert (nor could they) that those orders have led to less competition. They do not assert (nor could they) that those orders have led to higher prices for enterprise broadband services. They do not even assert (nor could

⁷⁴ FCC Final Plan for Retrospective Analysis of Existing Rules at 7 (rel. May 18, 2012).

they) that those orders have caused CLECs, such as Petitioners tw telecom, MegaPath and Cbeyond, to be less successful in their provision of enterprise broadband services.

When it comes to justifying the extreme remedy they seek, the Petitioners obliquely refer to “unreasonably high prices and anticompetitive conduct by dominant incumbent LECs.”⁷⁵ The Petitioners point to three supposed ways in which ILECs have allegedly used forbearance to engage in anticompetitive conduct with respect to their enterprise broadband services:

(1) maintaining prices “well in excess of competitive levels”; (2) using “their control over bottleneck last-mile facilities” to limit competitors’ ability to compete; and (3) using “exclusionary terms and conditions” in their special access contracts and tariffs to prevent customers from switching to rivals’ enterprise broadband services.⁷⁶ Even if these claims were legitimate, which they are not, they would not justify re-imposition of dominant carrier regulation.

Pricing. The Commission granted forbearance from CenturyLink’s Embarq and Qwest companies in 2007 and 2008, respectively.⁷⁷ As noted, CenturyLink has used that regulatory flexibility to negotiate more than 300 customized agreements with wholesale and retail enterprise broadband customers, generally at significantly lower rates than those that had been in its tariffs. Given the intense competition it faces from more than 30 national and regional providers of enterprise broadband services,⁷⁸ CenturyLink simply cannot maintain prices “in excess of competitive levels.” The Petitioners’ citation to a vague, unsupported *ex parte* submission from

⁷⁵ Petition at 3.

⁷⁶ *Id.* at 57-58.

⁷⁷ *Embarq Enterprise Broadband Forbearance Order*, 22 FCC Rcd 19478; *Qwest Enterprise Broadband Forbearance Order*, 23 FCC Rcd 12260.

⁷⁸ See Section VI.

2009 does not come close to supporting their counter-factual claim that the rates of CenturyLink and other ILECs are excessive.⁷⁹ Indeed, greater competition is causing downward pricing pressure for all providers of enterprise broadband services.⁸⁰

Control of Last-Mile Facilities. The Petitioners' claim that the ILECs are engaging in a "price squeeze" or somehow limiting CLECs' ability to compete is equally specious. This argument incorrectly assumes that ILECs' enterprise broadband services are a necessary input to CLEC-provided enterprise broadband services. On the contrary, CLECs enjoy multiple alternatives to ILEC enterprise broadband services. They can deploy their own facilities; buy wholesale services from a third party, such as a cable provider;⁸¹ use TDM-based DS1 and DS3 services, as both the Commission and D.C. Circuit have found;⁸² or, use copper loops purchased

⁷⁹ See Petition at 57 n.193, citing Letter from Jonathan Lechter, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137 (filed Dec. 22, 2009). The 2009 *ex parte* filing referenced by the Petitioners (at 57 n. 193) provides insufficient detail for CenturyLink to address the accuracy of CenturyLink's claimed prices, which appear to be significantly higher than those CenturyLink offered to tw telecom both prior to 2009 and more recently.

⁸⁰ See Frost & Sullivan, *U.S. Mobile Backhaul Services Market: Wireless Service Provider Spending Trends*, at 6 (Oct. 2011) ("Greater competition among vendors, as well as competing backhaul platforms, is creating downward pricing pressures for [mobile] backhaul service providers; which, in turn, is impacting their revenues and profitability."); Telegeography, *Global Enterprise Networks: Enterprise Service Pricing* at 16 (Jan. 2013) ("Median Ethernet market prices remain volatile, fluctuating considerably year to year. . . . With this said however, the long-term price trend is clearly down."); MegaPath website, *High Speed, Affordable, Business Ethernet* ("MegaPath has lowered the price of its popular Ethernet Basic."), available at <http://www.megapath.com/promos/ethernet/> (last visited Apr. 9, 2013).

⁸¹ See Fierce Telecom, *Cox Names Jeremy Bye as VP of Its Growing Wholesale Group* (Aug. 23, 2011), available at http://www.fiercetelecom.com/story/cox-names-jeremy-bye-vp-its-growing-wholesale-group/2011-08-23?utm_medium=rss&utm_source=rss; Press Release, Cbeyond, *Cbeyond Announces Partnership with FiberLight* (May 2, 2012), available at <http://ir.cbeyond.net/releasedetail.cfm?releaseid=669769>.

⁸² See *AT&T Enterprise Broadband Forbearance Order*, 22 FCC Rcd at 18721-22 ¶ 26; *Ad Hoc v. FCC*, 572 F.3d at 910.

at TELRIC rates, as many CLECs have so successfully done.⁸³ The CLECs' stunning market success belies a claim that the ILECs have somehow limited their ability to compete.⁸⁴ Indeed, Level 3 recently told investors that it enjoys margins of 50% on "off-net" traffic, and 80% on "on-net" traffic.⁸⁵

Terms and Conditions. The Petitioners also fail to explain how re-imposing dominant carrier regulation will address their tired claims of "exclusionary terms and conditions in their special access contracts and tariffs."⁸⁶ As it has discussed in detail, CenturyLink's terms and conditions for high-capacity services are just and reasonable, and any further regulation of such terms and conditions is unwarranted.⁸⁷ Indeed, the Commission *may not* take such action before finding that incumbents have market power, and the Commission has acknowledged that the record in the special access proceeding does not support such a finding today.⁸⁸ In cases where CenturyLink's plans do involve volume or revenue commitments, those features have been implemented for procompetitive and economically sound reasons, and are often employed by the CLECs themselves. Moreover, the so-called "remedies" demanded by some -- under which the

⁸³ See Section VI.D.

⁸⁴ See Petition at 58.

⁸⁵ Transcript of Level 3 Communications, Inc. Presentation, Morgan Stanley Technology, Media & Telecom Conference, at 1-3 (Feb. 26, 2013) (James Q. Crowe).

⁸⁶ Petition at 58.

⁸⁷ See Comments of CenturyLink, Inc., WC Docket No. 05-25, RM-10593 at 36-44 (filed Feb. 11, 2013); Reply Comments of CenturyLink, Inc., WC Docket No. 05-25, RM-10593 at 17-33 (filed Mar. 12, 2013).

⁸⁸ *In the Matter of Special Access for Price Cap Local Exchange Carriers*, Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16347 ¶ 69 (2012) (conceding that the Commission has "insufficient evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the special access market").

Commission would unilaterally excise certain contractual provisions while leaving in place the discounts that rely on them -- would be unwarranted and unlawful.

In any case, the marketplace is already addressing the concerns raised by the Petitioners. For example, dominant carrier regulation is not necessary to “enable competitors to serve multi-location business customers and . . . deploy fiber loops to such customers’ high-demand locations.”⁸⁹ CLECs (as well as cable and fixed wireless providers) are competing very successfully in the provision of enterprise broadband services, through various means, including the deployment of fiber.⁹⁰ Similarly, dominant carrier regulation is not necessary to “ensure that wireless carriers can obtain non-TDM-based special access circuits for wireless backhaul on reasonable rates, terms and conditions, thereby spurring the deployment of wireless broadband.”⁹¹ Petitioner Sprint anticipated “25 to 30 significant backhaul providers” in its first round of backhaul contracts, “that will likely be a mix of incumbent LECs, cable MSOs and alternative carriers, all of whom will be expected to deliver Ethernet predominately over fiber for Sprint’s new multi-mode network.”⁹² Moreover, before they are upgraded, wireless cell sites typically are not served by fiber, so it is unclear how dominant carrier regulation would enhance CLECs’ ability to provide fiber-based backhaul to those locations.⁹³

Thus, the Petitioners fall far short of demonstrating the need for a return to monopoly-style regulation of ILEC-provided enterprise broadband services.

⁸⁹ See Petition at 60.

⁹⁰ See Section VI.

⁹¹ See Petition at 60.

⁹² Carol Wilson, Tower Cloud, *Sprint to Reveal Backhaul Contract Winners Friday* (Oct. 5, 2011), available at http://clientadmin.lightreading.com/document.asp?doc_id=213050.

⁹³ Most RFPs for wireless backhaul service specify that the service must be provided over fiber (rather than copper).

V. PETITIONERS' PROPOSED RE-REGULATION WOULD UNDERMINE THE COMMISSION'S BROADBAND POLICIES AND DENY CONSUMERS THE BENEFITS OF THOSE POLICIES

The Petitioners ask the Commission to re-impose dominant carrier regulation on all ILEC enterprise broadband services. In doing so, they do not address the dampening effects of such regulation on facilities deployment and competition or the ways in which such regulation would conflict with the Commission's long-standing light-touch regulation of broadband and the Internet.⁹⁴ Just as importantly, reversing this forbearance would shatter the certainty necessary for broadband deployment, and disturb the industry's reasonable reliance on the ability to enter commercial agreements for enterprise broadband services.

A. Petitioners' Proposed Rules Would Dampen Incentives to Deploy Fiber

As noted, the Commission's forbearance from dominant carrier regulation of enterprise broadband services plays an integral role in the Commission's broadband policies. Nevertheless, the Petitioners blithely assert that *reversing* this forbearance "will advance the Commission's goal of increasing broadband in numerous ways."⁹⁵ Of course, it will do just the opposite. Requiring ILECs to provide access to broadband services facilities at regulated rates will discourage both ILECs *and* CLECs from deploying fiber to the two-thirds of commercial buildings that still lack fiber connectivity.

B. Petitioners' Proposed Rules Would Inflict the Harms on Competition and Consumer Welfare that the Commission Sought to Eliminate in the *Enterprise Broadband Forbearance Orders*

The re-regulation sought by the Petitioners also would reintroduce all the harms to competition that the Commission sought to eliminate in the *Enterprise Broadband Forbearance*

⁹⁴ See Petition at 60.

⁹⁵ *Id.*

Orders: disclosing ILEC prices to competitors,⁹⁶ “inhibit[ing] competitors from responding quickly to rivals’ new offerings,”⁹⁷ and preventing ILECs from providing “innovative integrated service offerings designed to meet changing market conditions” and “specifically tailored to [customers’] individualized needs.”⁹⁸ This ill-conceived regulation would lead to higher prices, fewer competitive choices, and one-size-fits-all offerings that fail to meet customers’ specified needs. This sclerosis would undoubtedly infect non-ILEC providers of enterprise broadband services as well. In CenturyLink’s experience, advance notice of its tariff offerings allows its numerous unregulated competitors to set their list prices just below CenturyLink’s tariffed rate in order to win business. Similarly, competitors are also unlikely to bid as aggressively if they know that ILECs cannot match competing offers in a timely manner.

Dominant carrier regulation also would place ILECs at a competitive disadvantage, giving a leg up to petitioners BT Americas, CBeyond, EarthLink, MegaPath, Sprint Nextel and tw telecom. In essence, these providers are seeking to make it harder for their ILEC rivals to package competing enterprise broadband services and deliver customized solutions. As a larger provider of Ethernet than CenturyLink, tw telecom, in particular, needs no such regulatory favors -- especially at the expense of enterprise customers.

⁹⁶ See *AT&T Enterprise Broadband Forbearance Order*, 22 FCC Rcd at 18725 ¶ 33. In areas where the ILEC is subject to dominant carrier regulation, competitors frequently price their services just below the tariffed rate of the ILEC.

⁹⁷ See *id.* at 18725 ¶ 33.

⁹⁸ See *id.* at 18725 ¶ 33.

C. Petitioners' Proposed Rules Would Disrupt Customers' and Carriers' Reasonable Reliance on the *Enterprise Broadband Forbearance Orders* and Call into Question All Prior Forbearance Relief

As a final matter, the unprecedented action sought by the Petitioners would disrupt the industry's well-founded reliance on ILECs' ability to offer customized arrangements for enterprise broadband services -- and, more generally, all prior forbearance relief.

As noted by Chairman Genachowski, "[s]ince Congress gave the Commission forbearance authority 17 years ago, the Commission has never reversed or undone a forbearance decision."⁹⁹ Given the passage of time and the vibrantly competitive marketplace for enterprise broadband services, this would be an exceedingly strange place to start.

In the *Enterprise Broadband Orders*, the Commission found that the detariffing of ILEC enterprise broadband services would "facilitate innovative integrated service offerings designed to meet changing market conditions and . . . increase customers' ability to obtain service arrangements that are specifically tailored to their individualized needs."¹⁰⁰ Over the past six years, enterprise customers have capitalized on these opportunities, by purchasing enterprise broadband services from ILECs, as well as their competitors, through individually-negotiated arrangements. These arrangements enable customers to obtain customized rates, terms and conditions that they can easily scale as their demand for broadband capacity grows.

⁹⁹ *The Third Way: A Narrowly Tailored Broadband Framework*, 2010 FCC Lexis 2898 (May 6, 2010)) (statement of Chairman Genachowski). See, also, Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* at 9 (May 6, 2010) (the Commission has never "overturned a grant of forbearance" under section 10, nor one made for wireless under the similar criteria of section 332(c)(1)), available at <http://www.fcc.gov/document/statement-fcc-general-counsel-austin-schlick-third-way-legal-framework-addressing-comcast-d>.

¹⁰⁰ See *AT&T Enterprise Broadband Services*, 22 FCC Rcd at 18725 ¶ 33.

The new rules sought by the Petitioners would suddenly curtail this flexible regulatory framework and threaten hundreds, if not thousands, of investment decisions and arm's length transactions created in reliance on the Commission's elimination of dominant carrier regulation. Going forward, these new rules also would upset enterprise customers' expectations regarding their ability to obtain individualized solutions from ILECs, as well as their competitors.

Over the past six years, CenturyLink has invested billions of dollars to extend fiber deeper in its network. For fiber backhaul to wireless cell sites alone, CenturyLink invested a total of nearly \$600 million in 2011 and 2012.

Like any carrier, CenturyLink has based its investment decisions on detailed cost-benefit analyses, weighing projected returns in today's lightly regulated environment against the risk that insufficient demand will lead its sunk investments to be stranded. If the Commission were to re-impose dominant carrier regulation now, it would undermine the cost-benefit calculus underlying years of sunk facilities investments because it would limit projected returns *without* making any corresponding reductions in the level of risk. A simple example illustrates the point. When an ILEC decides whether to deploy fiber facilities to a cell tower to serve a particular wireless provider, it might well project the unregulated revenues it can recover from (1) that wireless provider during the course of the original contractual term, (2) the same wireless provider after that term, and (3) from other wireless providers using that same cell tower. And in making that decision, it must balance those projected revenues against the risk of non-recovery, including the risk that the ILEC may never recover any revenues from any carrier outside the context of the original contract. A reversal of forbearance would upend the business case underlying such fiber deployments because it would reduce the projected revenues from all

sources without alleviating those risks of non-recovery.¹⁰¹ The same is true for ILEC investments to serve other enterprise broadband customers, such as government institutions and large businesses.

Indeed, the re-imposition of dominant-carrier regulation would, if anything, exacerbate an ILEC's risk of stranded investment because it would lead some customers to take their business to competitors that would not be hamstrung by such regulation and could thus offer them individualized solutions. In particular, the re-imposition of onerous tariffing requirements would restrict ILECs to fixed, one-size-fits-all offerings that would prevent them from negotiating individualized solutions and quickly meeting rivals' competing offers.¹⁰² Given these limitations, some customers would turn to their non-ILEC, less regulated competitors¹⁰³ -- such as Petitioners tw telecom and Cbeyond -- and the ILECs would lose business that they would have won but for the extraordinary rule change. This unanticipated loss of revenues would jeopardize countless business cases developed by the ILECs over the past six years, which they based on the reasonable assumption that the Commission would continue to regulate them as nondominant providers of enterprise broadband services. In many cases, the re-imposition of dominant-carrier regulation would retroactively make irrational the fiber-deployment decisions that ILECs had made under a reasonable expectation of continued light-touch regulation. But, because such investment is sunk, it could not be shifted to other, more productive uses.

¹⁰¹ Of course, the consequences would be even more severe if the Commission not only limited projected revenues but also sought to interfere in the ILEC's existing contractual relationship with the original wireless provider.

¹⁰² See *AT&T Enterprise Broadband Services*, 22 FCC Rcd at 18726 ¶ 35 (finding that relieving ILEC enterprise broadband services of dominant carrier regulation will make the ILECs more effective competitors).

¹⁰³ As discussed, such customers would find a wealth of alternative providers. See Section VI.

This abrupt change in regulation would also endanger interlocking business cases for other ILEC broadband services. For example, CenturyLink sometimes uses the fiber facilities it builds to a wireless cell site to reduce the cost of upgrading its network plant in a nearby residential neighborhood, in order to justify the cost of enhancing the company's broadband services in that neighborhood. By changing the reasonable assumptions underlying such business cases, a return to dominant carrier regulation might well reduce CenturyLink's anticipated return on investment for these network upgrades. And it would certainly cause CenturyLink to reconsider the economic logic behind such facilities upgrades in the future.¹⁰⁴

These reliance interests also extend to the ILECs' customers and investors.¹⁰⁵ Purchasers of ILEC enterprise broadband services have reasonably relied on the Commission maintaining the forbearance it granted in the *Enterprise Broadband Forbearance Orders*, as it has done with every other previous forbearance grant. When an enterprise broadband customer awards its business to a particular provider, it, like the provider, makes an investment in that relationship, based on the assumption that the provider will be able to continue to meet the customer's business needs. In some cases, the customer pays substantial upfront charges to cover part of the cost of needed facilities construction. In other cases, the customer contributes to the cost of construction primarily through recurring charges. In either case, the customer reasonably assumes that once those ILEC facilities are deployed, it can continue to use those facilities indefinitely.

¹⁰⁴ This change in regulation would particularly harm CenturyLink. Given that it does not provide facilities-based wireless services, enterprise broadband represents one of CenturyLink's primary growth areas.

¹⁰⁵ This detrimental reliance on the Commission's current regulation of enterprise broadband services would also extend to investors as well, who have reasonably relied on the ILECs' ability to compete effectively in the provision of these services.

The Petitioners' unparalleled rule change could disrupt that relationship, however, to the detriment of the customer and its ILEC provider, as well as competition in general. If the ILEC is restricted to offering enterprise broadband services through generally available tariffs, it may not be able profitably to offer a given term sought by the customer, such as a particular network configuration or service level agreement, if the ILEC has to make that term generally available to other customers. In that case, the customer will have to choose another provider, which may have to construct its own fiber facilities to the customer's location and pass on the cost of that construction to the customer in some form. If the customer is a carrier, it may also incur significant costs to reconfigure its interconnection facilities to accommodate the new provider.

At a broader level, the proposed re-regulation would call into question all prior forbearance relief, creating uncertainty and chilling investment and innovation. Thus, the unjustified and unprecedented "relief" sought by the Petitioners would have implications far beyond the issues presented in the petition.

VI. FORBEARANCE FROM DOMINANT CARRIER REGULATION IS EVEN MORE JUSTIFIED TODAY THAN IT WAS IN 2007

As noted, any modification of the Commission's regulation of enterprise broadband services must be based on a comprehensive analysis of the *current* market for these services (including the existence of potential competition). In fact, competition for enterprise broadband services has accelerated since the Commission issued the first of the *Enterprise Broadband Forbearance Orders* six years ago. During that time, providers of all types and sizes have successfully taken part in the marketplace for Ethernet and other enterprise broadband services, thus eliminating any suggestion that the ILECs are "dominant" in the provision of these services.

Today, there are more than 30 providers offering enterprise broadband services nationally or to large areas of the country, including six of the eight Petitioners. The result is an increasingly fragmented and dynamic marketplace. For example, CenturyLink is the fourth largest Ethernet provider, yet accounts for less than eight percent of the revenues for those services -- hardly the mark of a dominant provider.¹⁰⁶ In addition, every major cable provider now competes aggressively for enterprise broadband customers, and wireless providers are capitalizing on new technologies to offer enterprise broadband services to retail and wholesale customers. Finally, entities relying on unbundled DSO copper loops -- available ubiquitously at TELRIC rates -- are providing "Ethernet over copper" to high-volume enterprise customers not requiring OCn-level speeds.¹⁰⁷

A. Competitive Fiber Providers

In recent years, dozens of competitive fiber providers have capitalized on burgeoning bandwidth needs by providing carrier- and enterprise-grade Ethernet services over their ever-more-ubiquitous long-haul and metropolitan networks. CLECs such as Petitioner tw telecom boast to investors about their "big, beautiful, and powerful fiber network[s],"¹⁰⁸ as the cost of deploying new fiber "continues to fall."¹⁰⁹ tw telecom offers service "across the United States to

¹⁰⁶ Frost & Sullivan, *Analysis of the U.S. Retail Carrier Ethernet Services Market, 2012: Revenue Growth Surges as Carrier Ethernet Crosses the Chasm* at 40. As noted, petitioner tw telecom has a larger share of the market for these services than CenturyLink. *Id.*

¹⁰⁷ Contrary to Buso's declaration, *see* Petition at 34-35, wholesale and retail Ethernet services are functionally identical and substitutable, even if providers choose to offer them through different marketing channels.

¹⁰⁸ Transcript of tw telecom, Inc. Fourth Quarter 2012 Earnings Call, at 8 (Feb. 12, 2013) (Larissa L. Herda).

¹⁰⁹ Joshua Wilshusen, *Deploying Tomorrow's Fiber Networks Today*, Intergraph Connect (Jan. 15, 2013), available at <http://www.intergraphblogs.com/connect/2013/01/deploying-tomorrows-fiber-networks-today/>.

thousands of enterprise customers and buildings through a single Ethernet connection scalable to 10 Gig.”¹¹⁰ Its network reaches more than 18,000 on-net buildings with ubiquitous Ethernet service “across 75 markets” and more than 2,300 connected Local Serving Offices.¹¹¹ Last month, the company reported its 42nd consecutive quarter of enterprise service growth,¹¹² with 20% year-on-year growth in Ethernet and VPN products from the fourth quarter of 2011 to the fourth quarter of 2012.¹¹³ tw telecom “focus[es] on the medium and large enterprise,” serving “about 40% of the Fortune 1000 in some form or fashion.”¹¹⁴

XO provides a full suite of wholesale and retail enterprise services, including point-to-point private line, hub service, Ethernet (offering “bandwidth options ranging from 3Mbps to 10Gbps”), and “Wavelength” wireless connectivity.¹¹⁵ In August 2012, XO announced that it had become “the first service provider in the United States to deploy 100 Gbps . . . optical technology across a long haul fiber network on a nationwide basis.”¹¹⁶ XO’s Ethernet private

¹¹⁰ Press Release, tw telecom, tw telecom Launches Ubiquitous Availability of National Ethernet Solutions for Carriers (Dec. 17, 2012), *available at* <http://newsroom.twtelecom.com/2012-12-17-tw-telecom-Launches-Ubiquitous-Availability-of-National-Ethernet-Solution-for-Carriers>.

¹¹¹ See tw telecom website, <http://www.twtelecom.com/telecom-solutions/wholesale-ethernet/> (last visited Mar. 27, 2013).

¹¹² Investor Presentation, tw telecom, at 19 (March 2013), *available at* <http://www.twtelecom.com/investor-guide/investor-presentations/> (*TWT Investor Presentation*).

¹¹³ *Id.* at 20.

¹¹⁴ Corrected Transcript of TW Telecom, Inc., UBS Global Media and Communications Conference, at 9-10 (Dec. 4, 2012) (Michael A. Roleau, Senior VP-Business Development & Strategy, TW Telecom, Inc.).

¹¹⁵ XO Communications website, *Network Transport Overview*, <http://www.xo.com/services/carrier/transport/Pages/overview.aspx>. (last visited Mar. 27, 2013).

¹¹⁶ Press Release, XO Communications, *XO Communications First Service Provider to Deploy 100G Nationwide* (Aug. 14, 2012), *available at* <http://www.xo.com/about/news/Pages/539.aspx>.

line services offer a “[b]road nationwide reach to more than 75 markets,” and its metropolitan networks include “more than 1 million fiber miles.”¹¹⁷

Level 3’s network, for its part, includes “54,000 intercity route miles in North America connecting more than 150 cities,” “26,000 metro route miles in North America,” including “116 metro fiber networks in the United States,” and access to “more than 8000 on-net buildings.”¹¹⁸ In addition to “lit” services, Level 3’s dark fiber offering gives customers “control over scalability and capacity management, network management, technology evolution, and reliability and network uptime. . . .”¹¹⁹ President Jeff K. Storey told investors in September that the company had “100,000 buildings within 500 feet of [its] network,” and thus “can add those buildings at a very low cost. . . .”¹²⁰ That approach, he explained, reflected the company’s preferred means of expansion: “When we get a customer, if we can turn up that building quickly enough, we’ll turn up the building on fiber and never use an off-net service.”¹²¹

Smaller entities also successfully target specific enterprise customer niches. Petitioner Cbeyond, for example, has deployed fiber facilities to about 1000 buildings, and emphasizes that its presence in those buildings provides “the opportunity . . . to serve an additional seven, eight, nine, 10 or more customers in those same buildings, with little or no additional expense,”

¹¹⁷ XO Communications website, *Ethernet Private Line*, <http://www.xo.com/services/network/ethernet/Pages/EthernetPrivateLine.aspx> (last visited Mar. 27, 2013).

¹¹⁸ See Level 3, *Level 3 Dark Fiber Service*, at 2, available at http://cdn1.cust.footprint.net/prod/App_Data/Replicated/MediaFiles/4/E/D/%7B4ED3E219-0F8B-4A96-9028-591C50F9195B%7Dbrochure_dark_fiber_004.pdf (“*Level 3 Dark Fiber Service*”).

¹¹⁹ *Id.* at 1.

¹²⁰ Corrected Transcript of Level 3 Communications, Inc., Bank of America Merrill Lynch Media, Communications and Entertainment Conference, at 6 (Sept. 12, 2012).

¹²¹ *Id.* at 12.

opening a potential for “huge revenue[s].”¹²² Petitioner EarthLink operates a network “spanning 28,800 fiber route miles with 90 metro fiber rings and 4 secure data centers providing ubiquitous nationwide data and voice IP service coverage across more than 90 percent of the country.”¹²³

Petitioners’ purported claims about the lack of CLEC facilities into commercial buildings are unsubstantiated and irrelevant. These claims rely primarily on the declaration of Susan M. Gately, attached to the Petition. However, Gately’s analysis appears to be based on responses to the Commission’s non-mandatory data requests,¹²⁴ which included data from less than 10 percent of CompTel’s members.¹²⁵ Moreover, any economic barriers competitors face in constructing fiber facilities are also generally encountered by ILECs deploying fiber-based enterprise broadband services. ILECs do not have “ubiquitous networks of the facilities needed to provide special access services.”¹²⁶ According to a recent report, 64% of U.S. commercial buildings still are not connected by fiber facilities.¹²⁷

The Petitioners assert that CLECs can deploy fiber facilities only if the revenue opportunities are sufficiently large to overcome the sunk costs of deployment.¹²⁸ This same

¹²² Corrected Transcript of Cbeyond, Inc., Bank of America Merrill Lynch Media, Communications and Entertainment Conference, at 4 (Sept. 12, 2012) (J. Robert Fugate, Executive Vice President and Chief Financial Officer, Cbeyond, Inc.).

¹²³ EarthLink website, *EarthLink Fact Sheet*, <http://www.earthlink.net/med/www/about/EarthLink-Glance.pdf> (last visited Mar. 27, 2013).

¹²⁴ See Petition, Attachment 2, at 2 (Declaration of Susan M. Gately).

¹²⁵ See Mandamus Opposition at 21-22.

¹²⁶ See Petition at 53. See, also, *id.* at 6 (asserting that past examination “has yielded the conclusion that incumbent LECs own the only facilities serving the vast majority of business customers in the United States”).

¹²⁷ Vertical Systems Group, *U.S. Business Fiber Gap Steadily Closing* (Mar. 12, 2013), available at <http://www.verticalsystems.com/prarticles/stat-fiber-us-fiber-penetration-2012.html>.

¹²⁸ See Petition at 6.

analysis applies to CenturyLink, because it does not “have facilities in place to serve all of the locations designated by an end user.”¹²⁹ Just like other carriers, CenturyLink typically does not deploy fiber “on spec,” but rather only when it wins a customer that will provide sufficient revenue to economically justify the deployment. The same is true of fiber backhaul services to wireless cell sites. Just like Zayo, CenturyLink typically “does not have existing fiber facilities that can provide backhaul service to a cell site,” and “if and when it is awarded a contract to provide such service, [it] must deploy new fiber cable and bear the expense and delays associated with such fiber deployment.”¹³⁰

In such “new build” situations, an ILEC does not have significant first-mover advantages, even if it has copper facilities to the customer location. When an ILEC deploys fiber to a commercial building, it must obtain access rights from the building owner, just like a CLEC, because it needs space and power in the building for its fiber-terminating devices.¹³¹ In addition, just like a CLEC, the ILEC typically must install (or have the building owner install) fiber inside wiring from the terminating device to the end user customer.¹³² Thus, the ILEC must, at a minimum, negotiate various types of permission from the building owner, and in many instances

¹²⁹ See *id.* at 47. See, also, *id.* at 47-50 (citing previous statements by CLECs regarding need for a “strong business case” to justify deployment of facilities). Because the *Phoenix Forbearance Order* dealt only with TDM-based services, its findings regarding potential competition do not apply to enterprise broadband services, which frequently can generate significantly higher revenues, as bandwidth is scaled to meet a customer’s growing demands.

¹³⁰ See Petition at 52 n. 170.

¹³¹ Fiber-based terminating equipment requires electrical power to operate.

¹³² The presence of any existing copper inside wire in the building is of no use in providing these services.

must also compensate the building owner for this access.¹³³ The ILEC must also obtain access to, and any necessary permits for, conduit from the property line to the building to deploy its fiber, even if it is using the conduit for copper facilities. Such conduit frequently is owned and controlled by the building owner, so again CenturyLink has no advantage with respect to this aspect of deploying fiber facilities. To the extent conduit or right of way is owned by the ILEC, competitors can obtain access to that conduit at regulated rates, terms and conditions.¹³⁴ Finally, just like a CLEC, the ILEC must obtain any necessary permits for deploying its facilities in municipal rights of way. Thus, particularly for the services in question, ILECs possess no meaningful advantage over competitors based on the existence of their legacy copper network.¹³⁵

B. Cable Providers

Cable MSOs are also making deep inroads into the provision of enterprise broadband services, ratcheting up capital expenditures and enjoying significant revenue growth in this segment. Cable providers are in the “ideal position to develop comprehensive carrier Ethernet architecture to support a wide range of business services,” as they pass three-quarters of the nation’s businesses.¹³⁶ Cable providers’ hybrid fiber coaxial (HFC) facilities “can support the needs of all businesses, from small businesses, which require higher bandwidth and improved availability, to large enterprises, which require comprehensive management and performance

¹³³ CenturyLink’s existing agreements and easements with building owners for copper-based facilities typically are not sufficient to give it the additional access rights needed to deploy and provide fiber-based services in a building.

¹³⁴ See 47 U.S.C. § 224.

¹³⁵ CenturyLink also does not have advantages in terms of “cost structure, size, and resources.” See Petition at 53-54. CenturyLink regularly competes against competitors of much larger size and resources, including AT&T, Comcast, and Verizon. See Reply Comments of CenturyLink, GN Docket No. 12-353, at 6-7 (filed Feb. 25, 2013).

¹³⁶ Cable Enterprise Services at 88, 105.

monitoring across all of their sites.”¹³⁷ According to Insight, the provision of Ethernet services “is one area of the business services market where MSOs have significant market share.”¹³⁸ For this reason, “MSOs have made significant capital and organizational commitments to growing their commercial services market[.]”¹³⁹

The Petitioners’ claim that cable providers’ services are “viable substitutes” to the ILECs’ enterprise broadband services only “in limited circumstances” is belied by the rapid growth of cable companies’ commercial revenues.¹⁴⁰ By 2011, Comcast, Time Warner Cable, and Cox had each passed \$1 billion in annual “commercial services” revenue, with steady growth predicted in upcoming years.¹⁴¹ Moreover, Insight projects that cable operators will see “commercial service” revenues grow at a compound annual rate of 10 percent annually through 2017,¹⁴² while their market share for such services grows from 8 percent in 2012 to 13.3 percent in 2017.¹⁴³

¹³⁷ *Id.* at 82.

¹³⁸ *Id.* at 83.

¹³⁹ *Id.* at 4.

¹⁴⁰ See Petition at 39. Like all wireline providers, cable providers are constantly deploying fiber deeper into their network and splitting existing nodes into smaller serving areas in order to deploy higher speeds to both business and residential customers.

¹⁴¹ See Cable Enterprise Services at 26, 115. Indeed, in 2012, Comcast’s business service revenues climbed 34% to 2.4 billion. See Comcast News Release, *Comcast Reports 4th Quarter and Year End 2012 Results* (Feb. 12, 2013), available at <http://www.cmcsk.com/releasedetail.cfm?ReleaseID=739834>.

¹⁴² Cable Enterprise Services at 115.

¹⁴³ *Id.* at 9. Insight also projects that cable providers’ revenues from wholesale businesses will grow from \$0.7 billion to \$1.5 billion from 2012 to 2017. *Id.* at 135.

Comcast touts its suite of scalable enterprise services as a flexible alternative to incumbent LEC services.¹⁴⁴ For example, Comcast offers Ethernet private line services in “flexible, scalable point-to-point configurations delivering high-capacity fiber connections between two sites,” with business-class support, at capacities ranging from 1 Mbps to 10 Gbps.¹⁴⁵ It also offers Ethernet VPN service (“an ideal replacement for frame relay or ATM services,” configurable from 1 Mbps to 10 Gbps)¹⁴⁶ and “[a]ny-to-any connectivity” between physically distributed locations.¹⁴⁷ Comcast invested \$607 million in business-service Capex in 2011 alone,¹⁴⁸ and has seen “strong returns well above [its] cost of capital.”¹⁴⁹ On the company’s third-quarter 2012 earnings call, company Vice Chairman and Chief Financial Officer Michael Angelakis reported that the company “continue[d] to experience strength in [its] Business Services Group, . . . with revenue increasing 34% to \$621 million” for the quarter.¹⁵⁰ Angelakis

¹⁴⁴ See Comcast website, *Ethernet Data Services*, Comcast, <http://business.comcast.com/enterprise/services/data> (last visited Mar. 27, 2013).

¹⁴⁵ Comcast website, *Ethernet Private Line*, <http://business.comcast.com/enterprise/services/data/ethernet-private-line> (last visited Mar. 27, 2013).

¹⁴⁶ Comcast website, *Ethernet Virtual Private Line*, <http://business.comcast.com/enterprise/services/data/ethernet-virtual-private-line> (last visited Mar. 27, 2013).

¹⁴⁷ Comcast website, *Ethernet Network Service*, available at <http://business.comcast.com/enterprise/services/data/ethernet-network-service> (last visited Mar. 27, 2013).

¹⁴⁸ Corrected Transcript of Comcast Corp., Q4 2011 Earnings Call, at 6 (Feb. 15, 2012) (Michael J. Angelakis, Vice Chairman & Chief Financial Officer, Comcast Corp.).

¹⁴⁹ Corrected Transcript of Comcast Corp., Q1 2012 Earnings Call, at 5 (May 2, 2012) (Michael J. Angelakis, Vice Chairman & Chief Financial Officer, Comcast Corp.).

¹⁵⁰ Corrected Transcript of Comcast Corp., 3Q 2012 Earnings Call, at 5 (Oct. 26, 2012) (Michael J. Angelakis, Vice Chairman & Chief Financial Officer, Comcast Corp.). Comcast’s “momentum in business services continue[d] with revenue increased 32% in the fourth quarter and 34% for the full year for total revenue of \$2.4 billion [in] 2012.” Transcript of Comcast

also has noted that Comcast had begun by targeting businesses with 20 or fewer employees, but has moved on to serving businesses with between 20 and approximately 250 employees.¹⁵¹

Comcast is also seeing growth in its cell-site backhaul offerings, noting in early 2012 that it had “increased the number of installed towers by about 79% since 2010.”¹⁵² Angelakis recently noted that “the existing addressable market for [Comcast’s] Business Services group is probably around \$20 billion to \$25 billion, and we’re in the \$2.5 billion range so somewhere around 10%.”¹⁵³

Time Warner Cable (TWC) is seeing similar success and opportunity. The company offers business-class Ethernet services with “scalable bandwidth speeds ranging from sub-T1 to 10 Gbps.”¹⁵⁴ In 2012, TWC doubled the number of commercial buildings connected to fiber, and enjoyed “organic growth of more than 20%” among enterprise customers.”¹⁵⁵ TWC CEO Glenn Britt recently observed that business and government services were the company’s largest growth area. “I think it is only going to get bigger as we look at different verticals and the

Corp., 4Q 2012 Earnings Call (Feb. 13, 2013) (Michael J. Angelakis, Vice Chairman & Chief Financial Officer, Comcast Corp.).

¹⁵¹ Corrected Transcript of Comcast Corp., Wells Fargo Securities Technology, Media & Telecom Conference, at 8-10 (Nov. 7, 2012) (Michael J. Angelakis, Vice Chairman & Chief Financial Officer, Comcast Corp.) (“Angelakis Wells Fargo”).

¹⁵² Corrected Transcript of Comcast Corp., Q1 2012 Earnings Call, at 9 (May 2, 2012) (Neil Smit, President & Chief Executive Officer, Comcast Cable Communications LLC).

¹⁵³ Angelakis Wells Fargo at 9.

¹⁵⁴ See Time Warner Business Class® website, *EPL*, <https://www.twcbc.com/NYC/Products/ProductDetails/epl.ashx> (last visited Mar. 27, 2013).

¹⁵⁵ Corrected Transcript of Time Warner Cable, Inc., Q4 2012 Earnings Call, at 3 (Jan. 31, 2013) (Robert D. Marcus, President & Chief Operating Officer, Time Warner Cable, Inc.).

changes going on and our economy around us. . . . [T]he sky is the limit in this area.”¹⁵⁶ Indeed, just this January, TWC reorganized its management structure, creating a new business unit responsible for enterprise services -- a change meant to “reflect[]” that segment’s “increasing importance” and position the company “to fully capitalize on this significant growth opportunity.”¹⁵⁷

Cox is also competing successfully for high-capacity customers. Cox now boasts 290,000 business and wholesale customers,¹⁵⁸ and is the fifth largest provider of U.S. Business Ethernet Services.¹⁵⁹ Cox’s customers include healthcare, hospitality, and education providers as well as government agencies and wireless providers requiring cell-site backhaul.¹⁶⁰ Cox Business owns and operates a national backbone comprising 13,000 miles of fiber, with tailored offerings for businesses including 10 Gbps speeds available to those with the most demanding

¹⁵⁶ Corrected Transcript of Time Warner Cable, Inc., UBS Global Media and Communications Conference, at 11-12 (Dec. 3, 2012) (Glenn A. Britt, Chairman & Chief Executive Officer, Time Warner Cable, Inc.).

¹⁵⁷ Press Release, Time Warner Cable, *Time Warner Cable Announces New Organizational Structure*, (Jan. 23, 2013), available at http://www.timewarnercable.com/en/about-us/press/time_warner_cable_new_organizational_structure.html.

¹⁵⁸ Press Release, Cox Communications, *Cox Launches Mobile Version of Small Business Social Destination* (Oct. 9, 2012), available at <http://cox.mediaroom.com/index.php?s=43&item=634>. Cox also touts its expertise providing business services to these industries, in addition to the real estate and residential communities industries. See generally Cox website, *Industries*, <http://ww2.cox.com/business/lasvegas/industries.cox> (last visited Mar. 30, 2013).

¹⁵⁹ Vertical Systems Group, *2012 U.S. Business Ethernet Leaderboard* (Jan. 29, 2013), available at http://www.verticalsystems.com/prarticles/stat-flash-YE_2012_US_Leaderboard.html (2012 Ethernet Leaderboard).

¹⁶⁰ See, generally, Cox website, *Industries*, <http://ww2.cox.com/business/lasvegas/industries.cox> (last visited Mar. 30, 2013).

requirements.¹⁶¹ In September 2012, Cox announced the first market with new 80 Mbps and 100 Mbps offerings for small and medium business customers; the company intends to expand this offering into additional markets early this year.¹⁶²

Of course, success is not limited to the largest cable providers. Cablevision's business services unit, branded Lightpath, provides "Ethernet-based communications solutions for New York metropolitan area business," "leveraging the flexibility of Ethernet to create product suites for the education, healthcare and government verticals, as well as adding Next Generation Hosted Voice, Conference Bundle, Managed Video and Managed WiFi to its managed services lineup."¹⁶³ In the fourth quarter of 2012, Lightpath achieved a 13.2% increase in revenue from Ethernet services.¹⁶⁴

C. Wireless Providers

As wireless technology continues to mature, high-capacity services once available only over copper, coaxial cable, or fiber optics are increasingly being provisioned over the airwaves. For example, Broad Sky networks "now offers Spectrum 4GWiMAX, a fixed-wireless

¹⁶¹ Press Release, Cox Communications, *Cox Business Continues to Meet Customer Needs with Launch of Accelerated Broadband Tiers* (Sept. 12, 2012), available at <http://cox.mediaroom.com/index.php?s=43&item=631>.

¹⁶² *Id.*

¹⁶³ Press Release, Lightpath, *Lightpath Introduces New Branding and Logo* (Dec. 5, 2012), available at https://golightpath.com/pressreleases?p_p_id=56_INSTANCE_K0en&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=2&articleId=340393.

¹⁶⁴ Press Release, Cablevision, *Cablevision Systems Corporation Reports Fourth Quarter and Full Year 2012 Results* (Feb. 28, 2013), available at <http://www.cablevision.com/pdf/news/022813.pdf>.

solution[,] in 88 markets[.]”¹⁶⁵ Its networks “are built on fixed-wireless technology that is scalable up to GigE speeds” not reliant on “T1 or DS3 increments.”¹⁶⁶ Broad Sky also offers 4G LTE enterprise services “to replace expensive frame relay,” with “download speeds averaging 10MB.”¹⁶⁷ XO has broadband wireless spectrum in 80 major metropolitan markets to provide Broadband Wireless Access for Ethernet, Private Line and dedicated Internet access services.¹⁶⁸ Its “Fixed Wireless Access” service offers “an alternative last-mile and metro-area access solution” with “speeds up to 10 Gbps.”¹⁶⁹

Others are also exploring opportunities in the wireless space. BridgeWave uses millimeter-wave spectrum to provide “full gigabit (GigE) wireless transmission [as] an affordable alternative to high capacity leased circuits.”¹⁷⁰ BridgeWave cites “many advantages of utilizing high-capacity gigabit wireless links,” including “a rapid return-on-investment,” the absence of recurring costs, ease of deployment, and scalability.¹⁷¹ Towerstream offers high-

¹⁶⁵ See BroadSkyNetworks website, *Broadband Internet Sample Pricing*, <http://www.broadskynetworks.net/pricing.html> (last visited Mar. 30, 2013).

¹⁶⁶ *Id.*

¹⁶⁷ See BroadSkyNetworks website, *Broad Sky’s Spectrum 3G/4G LTE Fixed Wireless Service*, <http://www.broadskynetworks.net/4G-LTE-Business-Router-Back.html> (last visited Mar. 30, 2013).

¹⁶⁸ See XO Communications website, *Network Maps*, <http://www.xo.com/about/network/Pages/maps.aspx> (last visited Mar. 30, 2013).

¹⁶⁹ XO Communications website, *Fixed Wireless Access*, <http://www.xo.com/services/network/Pages/broadband-wireless.aspx> (last visited Mar. 30, 2013).

¹⁷⁰ BridgeWave Communications, *Gigabit Wireless Leased-Line Replacement*, at 2 (2011), available at http://www.digitalairwireless.com/files/Leased-Line-Replacement_1332962764.pdf.

¹⁷¹ BridgeWave Communications website, *Leased-Line Replacement*, <http://www.bridgewave.com/solutions/leased-line-replacement.cfm> (last visited Mar. 30, 2013).

speed Internet access to businesses in 13 major markets.¹⁷² It highlights its ability to place antennas “in locations where it is not physically possible or financially feasible to install fiber,” recognizing that, in those cases, its network provides a means by which carriers and other users can “backhaul their traffic to an aggregation location of their choice.”¹⁷³

D. Providers Relying on Unbundled Copper Loops

In addition to the many providers deploying their own facilities to provision enterprise broadband services, competitors are also leveraging new technologies to provide “Ethernet over Copper,” or “EoC,” using unbundled DS0-capacity copper loops.¹⁷⁴ The Petitioners’ proposed market power analysis pretends that this competition does not exist and that, if a CLEC is not serving a customer over its own fiber, it does not serve that customer.¹⁷⁵ The Commission could not reasonably employ such a flawed, illogical evaluation of the market.

EoC offers speeds ranging from 3 to 50 Mbps in many areas today.¹⁷⁶ Incumbent LECs are required to make these loops available at TELRIC rates in virtually all their wire centers,¹⁷⁷

¹⁷² See Towerstream website, *About Towerstream*, <http://www.towerstream.com/Company.aspx> (last visited Mar. 30, 2013).

¹⁷³ Corrected Transcript of Towerstream Corp., Q3 2012 Earnings Call, at 3-4 (Nov. 8, 2012) (Joseph Hernon, Chief Financial Officer, Towerstream Corp.).

¹⁷⁴ Thus, just as the Commission predicted, competitors are finding new means of providing their enterprise broadband services. See *AT&T Enterprise Broadband Forbearance Order*, 22 FCC Red at 18722 ¶ 26 (anticipating “that competitors will explore various options in seeking to provide enterprise broadband services.”).

¹⁷⁵ Petition at 33-34.

¹⁷⁶ See Letter from Joshua M. Bobeck, *et al.*, Counsel to Mpower Communications Corp., U.S. TelePacific Corp., ACN Communications Services, Inc., Level 3 Communications, LLC, TDS Metrocom, LLC, and Telecommunications for the Deaf and Hard of Hearing, Inc., to Marlene H. Dortch, FCC, WC Docket Nos. 10-188, 12-353, GN Docket Nos. 09-51, 13-5, RM-11358, at 5-6 (filed Jan. 25, 2013) (CLEC EoC Ex Parte).

¹⁷⁷ While the Commission has forbore from applying the copper loop unbundling mandate in a small handful of MSAs, its rules mandate that copper loops be made available for unbundling in

rendering EoC an economical means of obtaining high-capacity carriage. According to a recent *ex parte* filing made by several competitive LECs, “the unbundling regime gives competitors the ability to enter less concentrated markets and prove the business case that eventually may lead to deploying their own last mile facilities.”¹⁷⁸

Given its low cost, it is not surprising that many competitors have used Ethernet over Copper to serve enterprise customers. “[A] TelePacific survey of nine CLECs in California shows that they have installed EoC capability in 343 California wire centers, giving the majority of small and medium sized businesses served by those wire centers the ability to purchase EoC based broadband service today,” whereas a similar study found that “six CLECs provide EoC broadband options to more than 400,000 business customers in 130 wire centers in Texas.”¹⁷⁹

In October 2012, petitioner MegaPath completed its national Ethernet over copper rollout to nearly 700 central offices in the top 50 national markets.¹⁸⁰ Through this deployment,

all other areas. See 47 C.F.R. § 51.319(a)(1); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005).

¹⁷⁸ CLEC EoC Ex Parte at 6-7. Thus, the Petitioners’ claim of “low demand elasticity” for enterprise broadband services and “little opportunity [for customers] to switch to an alternative supplier” ignore what is actually happening in the market. See Petition at 51-52.

¹⁷⁹ CLEC EoC Ex Parte at 4. See also *id.* at 6 (“competitive EoC in California is available not only in urban business districts, but also in areas of the state where there are fewer concentrations of potential customers[.]”)

¹⁸⁰ Press Release, MegaPath, *MegaPath Completes National Ethernet over Copper Rollout, Adding to the Largest EoC Footprint in the United States* (Oct. 3, 2012), available at <http://www.megapath.com/about/press-releases/megapath-completes-national-ethernet-over-copper-rollout-adding-to-the-largest-eoc-footprint-in-the-united-states/>.

MegaPath can reach “millions of businesses with symmetrical speeds up to 45 Mbps.”¹⁸¹ For its part, XO pitches its EoC offering as “an easy, affordable, and immediate solution for providing feature-rich, high-speed access and services.”¹⁸² XO further emphasizes the benefits of its reliance on unbundled loops: “Thanks to legacy voice and the widespread deployment of DSL, twisted-pair copper is relatively ubiquitous throughout the first mile. Consequently, [EoC] is ideal as a deployment topology for residential neighborhoods and office complexes.”¹⁸³ In November, XO announced the addition of 100 Mbps EoC services to “nearly two million business locations.”¹⁸⁴

Numerous other competitive providers are leveraging EoC as well. Integra, for example, announced in November that it was offering “60 megabit-per-second (Mbps) Ethernet over Copper (EoC) symmetrical access throughout its network footprint.”¹⁸⁵ As Integra states, an EoC architecture permits use of “[s]ervices such as IP/MPLS VPN Solutions, Ethernet Services, high bandwidth internet, SIP Solutions and Hosted Voice Services . . . , allowing businesses to prioritize and easily manage complex network traffic while ensuring Class of Service and

¹⁸¹ *Id.* In May 2012, petitioner Cbeyond stated that it provided “21 percent of its customers with Metro Ethernet via Ethernet-over-Copper technology.” Press Release, Cbeyond, *Cbeyond Announces Partnership with FiberLight* (May 2, 2012), available at <http://ir.cbeyond.net/releasedetail.cfm?releaseid=669769>.

¹⁸² *XO Choosing the Right Ethernet Solution for Your WAN* at 12.

¹⁸³ *Id.*

¹⁸⁴ Press Release, XO Communications, *XO Communications Extends its Ethernet Services Leadership with New Speeds and Expanded Nationwide Coverage* (Nov. 7, 2012), available at <http://www.xo.com/about/news/Pages/546.aspx>.

¹⁸⁵ Press Release, Integra Telecom, *Integra Boosts Network Bandwidth with Symmetrical 60-Mbps Ethernet Over Copper Access* (Nov. 6, 2012), available at <http://www.integratelecom.com/about/news/Pages/Integra-Boosts-Network-Bandwidth-with-Symmetrical-60-Mbps-Ethernet-Over-Copper-Access.aspx>.

Quality of Service, even at peak traffic loads.”¹⁸⁶ In October 2012, Windstream announced that it was expanding its Carrier Switched Ethernet product to more than 300 new markets in which it is a competitive LEC, offering “interconnect ports of 100 Mbps, 1 Gbps, and 10 Gbps” and “end user loops from 3 Mbps to 1 Gbps” over technologies including EoC.¹⁸⁷ Granite Telecom offers EoC at 20 Mbps, 50 Mbps and 100 Mbps, citing “[s]ignificant cost savings over DS-3 and older network technologies.”¹⁸⁸

VII. CONCLUSION

For six years, the Commission has applied a restrained, commonsense regulatory framework for enterprise broadband services. Since then, the migration to these services has accelerated, customers’ choice of providers has grown, and prices have fallen. As a result, there is no reasonable justification for the Commission to revisit the competition-enhancing policies in the *Enterprise Broadband Forbearance Orders* -- even if the Commission had authority to do so. Instead, the Commission should retain the flexible regulation that is needed to keep pace with the growing demand for these critical broadband services and expand it to all ILEC-provided enterprise broadband services.

¹⁸⁶ *Id.* Last month, Integra announced that it “has experienced unprecedented growth within its Integra Wholesale division, through an enhanced Ethernet product portfolio, expanded fiber network and improved sales tools and resources for partners.” Press Release, Integra, *Integra Wholesale Experiences Record Growth*, (Mar. 11, 2013), available at <http://www.integratelecom.com/about/news/Pages/Integra-Wholesale-Experiences-Record-Growth.aspx>.

¹⁸⁷ Press Release, Windstream, *Windstream announces Carrier Switched Ethernet expansion* (Oct. 8, 2012), available at http://news.windstream.com/article_display.cfm?article_id=1419. See also Press Release, Windstream, *Windstream announces nationwide Carrier Switched Ethernet expansion* (announcing a nationwide expansion of its Carrier Switched Ethernet service), available at http://news.windstream.com/article_display.cfm?article_id=1462.

¹⁸⁸ See Granite website, <http://www.granitenet.com/> (under “Data Services,” “High Capacity”) (last visited Mar. 30, 2013).

For all these reasons, as well as those discussed above, the Commission should deny the
Petition.

Respectfully submitted,

CENTURYLINK

By: /s/ Craig J. Brown
Craig J. Brown
Suite 250
1099 New York Avenue, N.W.
Washington, DC 20001
303-992-2503
Craig.J.Brown@CenturyLink.com

Its Attorney

April 16, 2013